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QUESTIONS PRESENTED

I. Does the order of the Human Relations Commission enforcing the ordinance of the City of Pittsburgh, prohibiting a newspaper from placing help-wanted advertisements for jobs not carrying bona fide occupational exemptions in sex-segregated columns, violate the First Amendment to the United States Constitution?

(Answered in the negative by the Court below.)

II. Did the proceedings before the City of Pittsburgh Human Relations Commission violate petitioner's right to due process of law?

(Answered in the negative by the Court below.)

STATEMENT OF THE CASE

This case began on October 9, 1969, when the National Organization for Women, Inc. (NOW) filed a complaint (A. 4) with the City of Pittsburgh Commission on Human Relations (Commission), respondent herein.[1] The complaint charged the Pittsburgh Press, petitioner, with deliberate and constant violations of Section 8(j) of the Human Relations Ordinance of the City of Pittsburgh, Ordinance No. 75 of 1967 (A. 410-32), as amended by Ordinance No. 395 of 1969 (A. 433-36), by allowing employers to place advertisements in the male or female column when the jobs advertised do not have bona fide occupational qualification exemptions. Ordinance No. 75 is the basic anti-discrimination ordinance of the City; Ordinance No. 395 added discrimination on the basis of sex to the other discriminatory categories. Section 8(j) of the Ordinance makes it an unlawful employment practice for any person, defined in Section 4(j) so as to include a newspaper, to aid or participate in the doing of an act declared to be an unlawful employment practice (A. 422). Section 8(e) prohibits the placing of a discriminatory advertisement (A. 421).

[1] For the convenience of the Court, respondents have retained the method of referring to the appendices begun by petitioner. "Pet. App." refers to the appendix to the petition for certiorari. "A." refers to the separate appendix to the briefs.

Statement of the Case

Pursuant to Section 7(a) of the Ordinance (A. 417), the Commission made attempts to conciliate the matter, including the holding of a private hearing with the parties on October 17, 1969 (A. 14). When these attempts failed, the full Commission, with one member dissenting, found that the complaint set forth probable cause, and voted to hold a public hearing (A. 1, 14). On November 7, 1969, the complainant and petitioner were notified that the public hearing would be held and petitioner was furnished with a copy of the Complaint (A. 1, 14). On November 10, 1969, a notice of hearing on December 10, 1969 and a statement of charges were mailed to the parties (A. 1, 14). At the request of petitioner, the scheduled hearing was continued until January 15, 1970 (A. 1, 14).

After an answer and preliminary objections were filed by petitioner, hearings took place before the Commission on January 15 and 16 and February 12 and 26, 1970 (A. 1, 12). Various organizations were granted leave by the Commission to appear as amicus curiae. The Allegheny County Conference on Civil Rights, the National Association of Women Lawyers, the Pennsylvania Human Relations Commission and the Women's Equity Action League appeared as amici on behalf of complainant NOW, while the American Newspaper Publishers Association appeared as amicus for the Pittsburgh Press (A. 15).

At these hearings NOW presented testimony and exhibits showing that petitioner aided employers and other advertisers to discriminate against women.

Complainant's Exhibit No. 1 consists of advertisements in the Pittsburgh Press of January 4, 1970, showing the placement of advertisements, for which no bona fide occupational exemptions existed, in separate "Jobs—Male Interest" and "Jobs—Female Interest" columns (A. 37, 299-331).[2] Complainant's Exhibits No. 2 (A. 39, 333) and No. 3 (A. 120, 337-353) showed the same thing (No. 3 for a different date, December 28, 1969, with regard to jobs classified according to type of work).

Complainant presented testimony from the director of an employment agency that her experience had shown that placing an ad under "Male Interest" indicates a preference by the employer as to sex (A. 118). Petitioner's advertising manager himself testified that employers place ads in the "Jobs—Male Interest" column when they are looking for a man and the "Jobs—Female Interest" column when they are looking for a woman. If the advertiser does not express a preference, petitioner solicits one (A. 125-26, 173).

There was also testimony presented by complainant that several women had been discriminated against in hiring because of their sex when they applied for jobs advertised in the "Male" column (A. 264, 52-53, 122-23).

The three exhibits referred to above, along with complainant's Exhibit No. 4 (A. 97-100, 357-373),

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[2] Only a sampling of the advertisements set forth in Complainant's Exhibits Nos. 1 and 3 are set forth in the Appendix in this Court (A. 299-331, 337-353).

also showed the severe economic impact resulting from discrimination against women. Considerable sociological and psychological testimony was presented showing the harmful effects upon women of sex-segregated want-ads. This included the results of a study by Dr. Sandra Bem, Professor of Psychology at Carnegie-Mellon University, specializing in sex roles and sex differences, showing that an advertiser, by placing a want-ad in the "Male Interest" column, effectively discourages a large percentage of female applicants (A. 236-41).

Further, there was testimony that discrimination on the basis of sex is no different from discrimination for racial or any other non-merit factor, and that such discrimination causes the same harmful consequences to society (A. 72, 141).

Petitioner's case was basically that the want-ad system was set up to reflect reader preferences. Even if this were true, it would be irrelevant, as the Common Pleas Court pointed out (Pet. App. 41). However, the testimony of petitioner's advertising manager showed, as found below, that the system actually was set up to reflect advertiser preference (Pet. App. 16, 33, 41, 58; A. 125-26, 173, 389). Throughout its case, petitioner presented the position, contrary to the basic premise of the Ordinance, that sex discrimination was different from other forms of invidious discrimination (A. 180, 181, 287).

On July 23, 1970, the Commission issued an opinion and order (Pet. App. 1-18), to the effect that petitioner's want-ad system violated §8(j) of the

Human Relations Ordinance. Petitioner was ordered to cease and desist from violating the ordinance, and to utilize a want-ad system with no reference to sex.

Petitioner appealed to the Court of Common Pleas of Allegheny County, which wrote a second opinion in the case, and by order dated March 24, 1971, affirmed the order of the Commission, based upon the testimony given before the Commission (Pet. App. 19-45).

This order was in turn appealed to the Commonwealth Court of Pennsylvania, an intermediate appellate court. That tribunal, by opinion and order dated January 27, 1972 (Pet. App. 46-79; A. 377-408), modified the previous order so as to allow sex-designated column headings where the advertiser is exempt under the Ordinance or the job is certified by the Commission as qualifying for a bona fide occupational exemption (Pet. App. 69; A. 400). In other respects, the Commonwealth Court affirmed (Pet. App. 69; A. 400), with two judges dissenting as to a procedural due process question not raised by petitioner here (Pet. App. 70-79; A. 401-408).

All three tribunals below held that the placing of an advertisement for a job that did not have a bona fide occupational exemption was a violation of §8(e) of the Ordinance, that petitioner aided such violation, and that petitioner thus violated §8(j) (Pet. App. 16-17, 27-37, 51, 66; A. 382, 397). It was held that although the record showed violations by advertisers of §8(a) (Pet. App. 58; A. 389), prohibiting discrimination in hiring, such showing was

unnecessary to the decision, as the violations of §8(a) were clear. All three bodies held that the commercial advertising system involved here was not entitled to protection under the First Amendment (Pet. App. 7, 43-44, 65-66; A. 396-97), and that petitioner had not been deprived of due process of law (Pet. App. 3, 39-41, 52-57; A. 383-88).

The Press' petition to the Supreme Court of Pennsylvania for allowance of appeal was denied by order dated June 21, 1972, with one justice voting to allow the appeal to consider the First Amendment question (Pet. App. 80-81).

The Press then petitioned this Honorable Court for a writ of certiorari, which writ was granted on December 4, 1972, 93 S. Ct. 515.

SUMMARY OF ARGUMENT

The order of the Pittsburgh Human Relations Commission, prohibiting the Pittsburgh Press from placing employment advertisements in columns headed "Male" or "Female" when the job advertised does not carry a bona fide occupational exemption is not violative of the First Amendment. The case law, from *Valentine v. Chrestensen*, 316 U.S. 52 (1942), to the present, has uniformly held that commercial advertising is not protected speech. The First Amendment protects the exposition of ideas, speech which is concerned with public affairs. It does not protect commercial speech concerned solely with private business transactions.

The federal courts have sustained numerous statutes which prohibit advertising. Some, like the Civil Rights Acts of 1964 and 1968, prohibit discriminatory advertising, as does the Pittsburgh Ordinance, and others prohibit advertising of products harmful to society, like cigarettes.

Commercial advertising can be regulated by a general regulatory statute, such as this one prohibiting discrimination, despite an incidental effect upon speech. Particularly is this so where the speech, like petitioner's, is intertwined with action. Speech can be regulated for a legitimate police power reason, and speech that aids in the perpetration of an unlawful act is the clearest case for regulation.

Summary of Argument

Neither the City Ordinance nor the Commission's order imposes any "official government view" on petitioner, which is free to editorialize as it pleases upon sex discrimination, but simply may not use its want-ad system to perpetuate such discrimination. Nor does the Commission's order constitute an invalid prior restraint, as harmful commercial advertising has always been subject to the injunctive process. Finally, no chilling effect upon protected speech results from petitioner's being required to reject discriminatory ads. Not only are commercial ads unprotected speech because not expositions of ideas but the decision as to whether an ad is discriminatory is clear-cut, and no difficult screening process is required.

The Commission's order is not violative of due process of law. Although the evidence did show discrimination in *hiring* by employers, that evidence was superfluous, as petitioner's system unlawfully aids employers in placing discriminatory advertisements, which itself is a violation of the ordinance. The state courts have determined that placing an ad in a sex-designated column is discriminatory, and this reasonable construction of the ordinance is conclusive here. Moreover, the evidence, including the testimony of petitioner's advertising manager, shows how such ads aid employers to discriminate in hiring.

The "presumption" cases cited by petitioner are inapplicable here because there is no presumed fact. The violation is not discrimination in hiring, pre-

sumed from the placement of a discriminatory ad. The placement itself violates the Ordinance.

Although petitioner does not concede that sex discrimination, like other forms of discrimination, is an evil, petitioner basically seems to be arguing that there is no reasonable relationship between the assumed evil of sex discrimination and the means chosen to eliminate the evil, including prohibition of sex-segregated want-ads. This is a substantive due process argument, unlike the procedural due process arguments made below and in the petition for certiorari, and thus it cannot be raised for the first time here. In any event, the argument does not avail petitioner, as this Court has, for the last thirty-five years, declined to sit as a super-legislature to invalidate social and economic legislation with which it may not agree. In light of the numerous authorities holding that discriminatory advertising contributes to discrimination in employment, as well as the evidence in this case, the means chosen by the City of Pittsburgh to combat sex discrimination cannot be considered irrational.

The question of notice of the charges and sufficiency of the complaint is not before this Court, since the Amicus American Newspaper Publishers Association cannot raise issues not raised by petitioner. However, even judged by criminal standards, unnecessary here, both the complaint and the evidence were sufficient, as the proof shows that the offense, which petitioner aided, of placing a discriminatory advertisement was committed by thousands of advertisers. By all standards of fairness, petitioner had ample notice of the charges against it.

ARGUMENT

I. THE PROHIBITION OF SEX-SEGREGATED NEWSPAPER ADVERTISEMENTS DOES NOT VIOLATE THE FIRST AMENDMENT

A. Commercial Advertising Is Not Protected Speech Under the First Amendment

The Commonwealth Court of Pennsylvania, in discussing this issue, stated that the American Newspaper Publishers Association, Amicus, had raised the "specter" of an alleged violation of the newspaper's right to freedom of the press (Pet. App. 65; A. 396). The Court's appellation is apt, for the issue is lacking in substance. The great constitutional guarantee is denigrated when it is sought to be applied in the instant situation.

The City of Pittsburgh Commission on Human Relations, an administrative body created for and devoted to the ideal of protecting civil rights, the Court of Common Pleas of Allegheny County, and the Commonwealth Court of Pennsylvania, all considered this issue, and found petitioner's First Amendment argument totally lacking in merit. They cited numerous cases, both federal and state, holding that commercial advertising may not avoid police power regulation by crying "First Amendment."

Argument

1. The absolutist theory of the First Amendment has not prevailed.

Petitioner asserts an absolutist view of the First Amendment which, although advanced by some, most notably the late Justice Black, has never been accepted by a majority of this Court. In *Konigsberg v. State Bar of California*, 366 U.S. 36 (1961), this Court, speaking through the late Justice Harlan, held:

> "At the outset we reject the view that freedom of speech and association [citing a case] as protected by the First and Fourteenth Amendments, are 'absolutes.'"
>
> 366 U.S. at 49.

Likewise, Justice Brennan has stated that:

> "... the absolute view has not prevailed within the Court. A majority of the Justices from time to time have recognized some contexts in which government has power to curb speech as such."
>
> Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 Harv. L. Rev. 1, 5 (1965).

Justice Harlan in *Konigsberg* pointed out that in at least two ways, constitutionally protected freedom of speech is narrower than the absolute which petitioner would assert. The first is that:

> "... certain forms of speech, or speech in certain contexts, has been considered outside the scope of constitutional protection."
>
> 366 U.S. at 50.

The absolute approach

> ". . . cannot be reconciled with the law relating to libel, slander, misrepresentation, obscenity, perjury, *false advertising*, solicitation of crime, complicity by encouragement, conspiracy, and the like. . . ." (Emphasis added.)
>
> 366 U.S. at 49 n.10.

In *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942), this Court, in denying First Amendment protection to "fighting words", held that the Amendment does not protect expression which is "no essential part of any exposition of ideas."

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2. Commercial advertising in this Court: Valentine v. Chrestensen to New York Times Co. v. Sullivan.

It is well settled, in particular, that while "freedom of communicating information and disseminating opinion" enjoys a high degree of protection, "the Constitution imposes no such restraint on government as respects purely commercial advertising." *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942). "In the quarter century since Valentine v. Chrestensen the notion that commercial advertising is not protected by the First Amendment has been enshrined among the commonplaces of constitutional law." *Developments in the Law—Deceptive Advertising*, 80 Harv. L. Rev. 1005, 1027 (1967).

In that case, this Court sustained the constitutionality of a New York City ordinance prohibiting the

distribution of commercial and business advertising matter. On the basis of the *commercial* advertising involved in *Valentine*, it was distinguished from *Schneider v. Town of Irvington*, 308 U.S. 147 (1939), in which several ordinances either totally forbidding or severely restricting the distribution of handbills were struck down as an infringement upon the First Amendment.

Valentine v. Chrestensen is good law today. It has been cited with approval by this Court in *Jamison v. Texas*, 318 U.S. 413, 417 (1943); *Murdock v. Pennsylvania*, 318 U.S. 105, 111 (1943); *Martin v. Struthers*, 319 U.S. 141, 142 (1943); *American Communications Assn. v. Douds*, 339 U.S. 382, 412 (1950); and more recently in *New York Times Co. v. Sullivan*, 376 U.S. 254, 265-66 (1964); *Ginzburg v. United States*, 383 U.S. 463, 474 (1966) and *Time, Inc. v. Hill*, 383 U.S. 374, 381 (1967). In *Ginzburg*, this Court, assuming that the disputed publications were not obscene in themselves, found them to be unprotected by the First Amendment viewed against "a background of *commercial* exploitation." (Emphasis added.) 383 U.S. at 466.

Justice Brennan, speaking for the Court in *New York Times*, was careful to distinguish the political advertisement involved there from the commercial type of advertising involved in *Valentine v. Chrestensen*, which we have here. Sullivan had argued that the guarantees of freedom of speech and of the press were inapplicable because the allegedly libelous statements were published as part of a paid advertise-

ment. This Court distinguished commercial advertisements from what has been called an "advertorial" involved there. Note, *Resolving the Free Speech-Free Press Dichotomy: Access to the Press Through Advertising*, 22 U. Fla. L. Rev. 293, 299 n.47 (1969).

The *Times* Court held:

> "The publication here was not a 'commercial' advertisement in the sense in which the word was used in Chrestensen. It communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern."
>
> 376 U.S. at 266.

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3. Ideas vs. Non-Ideas: The want-ad system seen in light of New York Times and the Meiklejohn Theory.

(a) *Want-Ads and Their Headings Are Non-Ideas*

In contrast to the situation in *New York Times Co. v. Sullivan*, supra, we are here dealing with want-ads. As stated by the Court of Common Pleas "it is difficult to think of a more commercial aspect of the paper than captions to the classified advertising section" (Pet. App. 43).

Petitioner has argued that its format for the placement of want-ads constitutes an editorial function.

In essence it asks this Court to suspend all of its common sense and practical knowledge, as well as to ignore the record in this case. Petitioner asserts here that it places the ads in a manner which it believes will facilitate the convenience of its readers; yet the record clearly shows that the arrangement is for the convenience of the advertisers (Pet. App. 58; A. 389). The basic facts, as opposed to mixed questions of fact and law, as found by the State courts are not open to review here. *King v. West Virginia*, 216 U.S. 92 (1910).

Want-ads are placed by employers or employment agencies to obtain a person to fill a job in the economic world; they are "no essential part of any exposition of ideas." *Chaplinsky v. New Hampshire*, 315 U.S. at 572. The framework of the newspaper want-ad section, directing these non-ideas in certain directions like a traffic patrolman on a street corner, cannot raise the non-ideas to the level of ideas. It can however, as will be discussed in Part II of this Brief, aid in discrimination on the basis of sex when arranged as petitioner arranges its want-ads. The column headings are a part of a commercial aspect of the newspaper, directed toward raising revenue and not propagating ideas. Newspapers are big business. See Note, *The Duty of Newspapers To Accept Political Advertising—An Attack on Tradition*, 44 Ind. L.J. 222 (1969); Note, *Resolving the Free Speech-Free Press Dichotomy*, supra. The want-ad section is part of the business aspect of the newspaper, not part of its exposition of ideas.

Respondents are thus not in disagreement with the thrust of Justice Douglas' concurring opinion in *Cammarano v. United States*, 358 U.S. 498, 515 (1959), in which he asserts that owners of a beer distributorship who advertise seeking to defeat legislation which would make liquor a state monopoly, are exercising First Amendment rights despite their profit motive in so doing. Respondents do not claim that a mere commercial form removes the protection of the First Amendment. Such a view would obviously be inconsistent not only with *New York Times Co. v. Sullivan*, supra, but with *Smith v. California*, 361 U.S. 147, 150 (1959), decided shortly after *Cammarano*, where First Amendment protection attached to a bookseller, even though the dissemination took place under commercial auspices. Respondents are not contending that petitioner be prohibited from expressing any view it desires on any subject, including the propriety of sex discrimination, in its editorial or news columns, or even the comics, merely because newspapers are sold. *New York Times*, 376 U.S. at 266. We are insistent, however, that captions in want-ads do not express ideas, and, in line with *Valentine v. Chrestensen*, supra, are not protected by the First Amendment.

(b) *The Meiklejohn Theory*

The principle that commercial speech, viewed with the gloss of *Smith* and *New York Times*, is not entitled to First Amendment protection, is sound. Professor Emerson has stated:

> "... communications in connection with commerical transactions generally relate to a separate sector of social activity involving the system of property rights rather than free expression, ..."
>
> Emerson, *Toward a General Theory of the First Amendment*, 105 n. 46 (1966).

In Note, *Freedom of Expression in a Commercial Context*, 78 Harv. L. Rev. 1191, 1195 (1965), it is stated:

> "The possibly desirable objectives furthered by advertising would not seem to require its protection by the First Amendment, particularly since the primary purpose of commercial advertising is to advance the economic welfare of business enterprises, over which state and federal governments enjoy wide powers of regulation."

See also *The First Amendment and Regulation of Television News*, 72 Columbia L. Rev. 746, 757 (1972).

Moreover, the principle is in complete accord with Dr. Meiklejohn's theory of the First Amendment, a theory which has apparently been accepted by this Court. Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, supra. The Meiklejohn theory is expounded in Meiklejohn, *The First Amendment Is an Absolute*, 1961 Supreme Court Review 245, a note whose content cannot be garnered from its title. For the theory is far from that of Justice Black. Rather it is a view that,

with regard to *public affairs*, freedom of expression is absolute:

> "The First Amendment does not protect a 'freedom to speak'. It protects the freedom of those activities of thought and communication by which we 'govern'. *It is concerned not with a private right*, but with a public power, a governmental responsibility.
>
> * * *
>
> Public discussions of public issues, together with the spreading of information and opinions bearing on these issues, must have a freedom unabridged by our agents." (Emphasis added.)

Meiklejohn, *The First Amendment Is an Absolute*, supra, at 255, 257.

The Meiklejohn theory finds support in the thoughts of the framers of the Constitution. In *Roth v. United States*, 354 U.S. 476, 484 (1957), this Court quoted a letter of the Continental Congress to the inhabitants of Quebec in 1774. The letter indicated that their view of freedom of the press was to assure unfettered interchange of ideas for the bringing about of political and social change.

Outside this realm of public affairs, which includes not just issues upon which we vote, but expressions in the realms of education, philosophy, the sciences, literature, and the arts, by which expressions we learn to become more responsible citizens in the public world, the First Amendment is inapplicable:

> "We must recognize that there are many forms of communication which, since they are not being used as activities of governing, are wholly outside the scope of the First Amendment."
>
> Meiklejohn, *The First Amendment Is an Absolute*, supra, at 258.

Dr. Meiklejohn points out that Justice Holmes had recognized these, as had Justice Harlan, and refers to *Konigsberg v. State Bar of California*, supra.

New York Times Co. v. Sullivan, supra, and its progeny seem to adopt in toto the Meiklejohn theory. The distinction in those cases between private libel and libel of a public figure is exactly the distinction which Dr. Meiklejohn drew. Respondents are shocked that petitioner would seek to rely on *New York Times*, for it is clear that the want-ad system, an economic mechanism whereby petitioner, for remuneration, performs the service of advertising jobs, lies on the private side of the public-private dichotomy. See *Grove v. Dun & Bradstreet, Inc.*, 438 F. 2d 433 (3d Cir.), cert. denied, 404 U.S. 898 (1971).

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4. Statutes regulating advertising, including discriminatory advertising, have uniformly been held not to violate the First Amendment.

The unprotected nature of commercial advertising speech has been recognized by the lower courts, some construing statutes and ordinances very similar to that involved here. In *Greenfield v. Field Enter-*

prises, Inc., 4 E.P.D. ¶7763 (N.D. Ill. 1972), the Court construed §704(b) of the Civil Rights Act of 1964, 42 U.S.C.A. 2000e-3(b), which is quite similar to §8(e) of the Pittsburgh Ordinance.[8] Although holding that the language of that Act (which does not have a section prohibiting aiding or participating in discriminatory practices) excluded newspapers from its coverage, the Court pointed out that the section is not violative of the First Amendment in prohibiting help-wanted listings under separate male and female headings:

> "A first amendment issue has been raised in this case in the brief of the Chicago Tribune Company. This defendant sees the relief sought in this case as a prior restraint on freedom of the press, and clear violation of well-established first amendment protections, and condemns it as a most invidious encroachment upon cherished American rights.

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[8] Section 704(b) provides:

"(b) It shall be an unlawful employment practice for an employer, labor organization, or employment agency to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment."

This alarm is without basis. In addition to being the conduits for the transmission of facts and opinions to the American public, newspapers are businesses. In their commercial aspect, they enjoy no special first amendment privileges. If their practices in the commercial business of publishing classified advertisements for compensation violate the Civil Rights Act of 1964, the first amendment does not shield them from the consequences of their activity."

Section 804(c) of the Civil Rights Act of 1968, 42 U.S.C.A. §3604(c), is another federal statute, like the Pittsburgh Ordinance, prohibiting discriminatory advertising.[4] In *United States v. Hunter*, 459 F. 2d 205 (4th Cir., Sobeloff, S.J.), cert. denied, 93 S. Ct. 235 (1972), the Government sought an injunction against a newspaper which had published certain discriminatory housing advertisements. Although refusing an injunction, the District Court entered a declaratory judgment sustaining the constitutionality of the above-quoted section against the assertion that it was violative of the newspaper's First Amend-

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[4] §3604. Discrimination in the sale or rental of housing.

* * *

* * *

* * *

(c) [It shall be unlawful] to make, print, or publish, or cause to be made, printed, or published, any notice, statement, or advertisement with respect to the sale or rental of a dwelling that indicates any preference, limitation or discrimination based on race, color, religion, or national origin or an intention to make any such preference, limitation, or discrimination."

ment rights. The publisher appealed to the Court of Appeals for the Fourth Circuit, which affirmed in a lengthy and erudite opinion. In the portion of the Court's opinion of particular relevance to this proceeding, the First Amendment argument was rejected on the basis of the line of cases following *Valentine v. Chrestensen*, supra, the "unbroken line of authority from the Supreme Court down which distinguishes between the expression of ideas protected by the First Amendment and commercial advertising in a business context." 459 F. 2d at 211.

The Fourth Circuit opinion in *Hunter* notes that the constitutionality of §3604(c) as applied to newspapers has been upheld by the District Court in *Holmgren v. Little Village Community Reporter*, 342 F. Supp. 512 (N.D. Ill., 1971). The constitutionality of §3604(c) was also sustained in *United States v. A. B. Smythe Company, Inc.* (No. C 69-885, N.D. Ohio, 1970).[5] See also *United States v. Mintzes*, 304 F. Supp. 1305, 1312 (D. Md. 1969), and *An Anti-Blockbusting Ordinance*, 7 Harv. J. Legis. 402, 411, 413 (1970).

Several other federal statutes which prohibit advertising of one type or another have been held not to run afoul of the First Amendment. In *Capital Broadcasting Co. v. Acting Attorney General*, 405 U.S. 1000 (1972), aff'g. 333 F. Supp. 582 (D.D.C. 1971) (three-judge court), the Act of April 1, 1970,

[5] A copy of this opinion can be found as an Appendix to the brief of the United States in the Court of Appeals in *Hunter*, supra, cert. denied, 93 S. Ct. 235 (1972).

Pub. L. 91-222, §2, 84 Stat. 89, 15 U.S.C.A. §1335, prohibiting cigarette advertising on any medium of electronic communication subject to the jurisdiction of the FCC, was held to be constitutional as against First Amendment attacks. The three-judge court pointed out that advertising is not protected the same way other forms of speech are, and stated that Congress has the power to prohibit the advertising of cigarettes in any media. See also *Banzhaf v. F. C. C.*, 405 F. 2d 1082, 1101 (D.C. Cir. 1968), cert. denied sub nom. *Tobacco Institute, Inc. v. Federal Communications Commission*, 396 U.S. 842 (1969), where the Court of Appeals noted:

> "Promoting the sale of a product is not ordinarily associated with any of the interests the First Amendment seeks to protect."

The same situation applies, of course, to employment want-ads which promote the sale of a "product" also, i.e., job openings. Just as Congress has the power to prohibit cigarette ads, so too does the Council of the City of Pittsburgh have the power to prohibit advertising that aids in discrimination.

In *New York State Broadcasters Assoc. v. United States*, 414 F. 2d 990 (2d Cir. 1969), cert. denied, 396 U.S. 1061 (1970), the Court held that the Act of June 24, 1948, c. 645, 62 Stat. 763, 18 U.S.C.A. §1304, prohibiting the broadcasting of lottery information, did not violate the First Amendment. Similarly, the Court in *Securities & Exchange Comm. v. Texas Gulf Sulphur Co.*, 446 F. 2d 1301, 1306 (2d Cir.), cert. denied, 404 U.S. 1005 (1971), re-

jected the contention that predicating a violation of SEC Rule 10b-5 on a press release is violative of the First Amendment. The Court held that "the First Amendment deals with the free exchange of ideas and not with commercial 'factual' speech", citing *Valentine v. Chrestensen*, among other cases. Thus the press release could be regulated, like registration statements and prospectuses, and like the want-ad system involved here.

The commercial advertising involved here is the type of "speech" that is unprotected by the First Amendment.

B. General Regulatory Statutes Incidentally Affecting Speech, Particularly Speech Intertwined With Conduct, Are Not Violative of the First Amendment

1. General regulatory statutes incidentally affecting the press are common.

We have noted earlier that Justice Harlan in *Konigsberg v. State Bar of California,* supra, in reviewing the First Amendment decisions of this Court, found at least two ways in which the First Amendment has been construed as less than absolute. The first, as we have seen, involved contexts in which speech, such as the commercial advertising here, is beyond the scope of constitutional protection. The second involves general regulatory statutes which incidentally affect speech:

> "[G]eneral regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the states to pass, when they have been found justified by subordinating valid governmental interests . . ."
>
> 366 U.S. at 50-51.

Even if we assumed, contrary to fact, that petitioner's commercial activity constitutes "protected speech, this by no means suggests that it cannot be regulated for a valid governmental purpose. Just

last term, this Court addressed itself to this issue in *Branzburg v. Hayes*, 408 U.S. 665 (1972). There a state statute of general applicability which incidentally affected the press was upheld and ample precedent was cited for such action. We quote therefrom:

> "It is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability. Under prior cases, otherwise valid laws serving substantial public interests may be enforced against the press as against others, despite the possible burden that may be imposed. The Court has emphasized that '[t]he publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and properties of others.' Associated Press v. NLRB, 301 U.S. 103, 132-133 (1937)."
>
> 408 U.S. at 682-83.

The *Branzburg* Court pointed out that in *Associated Press v. NLRB*, 301 U.S. 103 (1937), this Court held that a news gathering and disseminating organization was not exempt from the requirements of the National Labor Relations Act. Later cases held newspapers subject to the Fair Labor Standards Act and the Sherman Anti-Trust Act. *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 192-93 (1946); *Mabee v. White Plains Publishing Co.*, 327 U.S. 178 (1946); *Associated Press v. United States*,

326 U.S. 1 (1945); *Lorain Journal Co. v. United States*, 342 U.S. 143, 155-56 (1951).

As stated in *Branzburg:*

> "The prevailing view is that the press is not free with impunity to publish everything and anything it desires to publish. Although it may deter or regulate what is said or published, the press may not circulate knowing or reckless falsehoods damaging to private reputation without subjecting itself to liability for damages, including punitive damages, or even criminal prosecution. See New York Times Co. v. Sullivan, 376 U.S. 254, 279-280 (1964); Garrison Publishing Co. v. Butts, 388 U.S. 130, 147 (1967) (opinion of Harlan, J.); Monitor Patriot Co. v. Roy, 401 U.S. 265, 277 (1971). A newspaper or a journalist may also be punished for contempt of court, in appropriate circumstances. Craig v. Harney, 331 U.S. 367, 377-378 (1947)."
>
> 408 U.S. at 683-84.

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2. Petitioner's want-ad system is action mixed with speech, and is thus less protected than pure speech.

In *Frohwerk v. United States*, 249 U.S. 204, 206 (1919), this Court, speaking through Justice Holmes, sustained the conviction of a newspaper publisher for conspiracy to violate the Espionage Act of 1917 by publishing articles aimed at the obstruction of re-

cruiting. In response to the defendant's argument that, as applied to the newspaper articles, the Act was unconstitutional, Justice Holmes replied:

> "[T]he First Amendment while prohibiting legislation against free speech as such cannot have been, and obviously was not intended to give immunity for every possible use of language. Robertson v. Baldwin, 165 U.S. 275, 281. We venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counselling of a murder within the jurisdiction of Congress would be an unconstitutional interference with free speech."

Although aiding in discrimination may not be as heinous an offense as counselling to murder, it is just as much contrary to the express wishes of the relevant legislative body. This is true, even if, like counselling to murder, there is an idea associated with the conduct involved. This Court stated in *United States v. O'Brien*, 391 U.S. 367, 376 (1968):

> "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."

Judge Kaufman of the United States Court of Appeals for the Second Circuit has noted that "Conduct otherwise illegal cannot be condoned merely because the person engaging in it intends thereby to express an idea," giving the example of a bomb threat. Kaufman, *The Medium, the Message, and the First Amend-*

ment, 45 N.Y.U. L. Rev. 761, 773-74 (1970). See *New York State Broadcasters Ass'n v. United States*, supra at 997.

In *Donaldson v. Read Magazine*, 333 U.S. 178 (1948), this Court, speaking through Justice Black, sustained the power of the Postmaster General to prohibit various mailing rights of a magazine found by him to be conducting an enterprise to obtain money by false pretenses. The argument that such power violated First Amendment rights was rejected utterly. Freedom of press was held not to include the freedom to perpetrate swindling schemes. 333 U.S. at 191.

Just this term, this Court held that a police power regulation of the California Department of Alcoholic Beverage Control prohibiting various explicit sexual forms of entertainment in bars licensed by it, did not violate the First Amendment. *California v. LaRue*, U.S. , 93 S. Ct. 390 (1972). Justice Rehnquist pointed out that:

> "States may sometimes proscribe expression which is directed to the accomplishment of an end which the State has declared to be illegal when such expression consists in part of 'conduct' or 'action', Hughes v. Superior Court, 339 U.S. 460 (1950); Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949)." 93 S. Ct. at 396.

Although *LaRue* was based in part on the state's power over liquor under the Twenty-first Amend-

ment, this Court recognized that the states require no specific grant of authority to legislate with respect to matters traditionally within the scope of the police power. 93 S. Ct. at 395. In any event, the anti-discrimination thrust of the Fourteenth Amendment provides at least as much support for the Pittsburgh Human Relations Ordinance as the Twenty-first did for the liquor regulation.

As in *LaRue*, in the instant case we are not in the realm of ideas; we are dealing with action as well as speech. This is not an editorial dealing with sex discrimination, but an actual participation in it. Moreover, the Press has not simply aided advertisers to discriminate by constituting itself as a passive medium for the transmission of the advertisements to the public as in *Hunter*, supra. It has actively participated in the aiding of discrimination by itself creating the discriminatory structure. In addition, the Commission's 6th Finding of Fact is that where advertisers express no preference for a column, petitioner, rather than placing the ad in the non-discriminatory Male-Female column, solicits a preference (Pet. App. 16).

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3. Advertising is subject to regulation for legitimate purposes.

The courts have recognized that advertising, in particular, can be controlled for a legitimate reason. *Capital Broadcasting Co. v. Kleindienst*, supra; *Banzhaf v. United States*, supra. Even where advertise-

ments are politically motivated, not the situation here by any stretch of the imagination, the courts have sustained their prohibition where reasonable requirements imposed under the police power have not been followed. See *United States v. Scott*, 195 F. Supp. 440 (D.N.D. 1961), upholding against attack on First Amendment grounds 18 U.S.C.A. §612, prohibiting the publication or distribution of political campaign statements which do not contain the names of those responsible for such statements.

Recognizing the legitimate police power concerns of the state, courts have generally denied the relevance of the First Amendment to regulation of advertising. *Developments in the Law—Deceptive Advertising*, supra, at 1036. See *Media and the First Amendment in a Free Society*, 60 Geo. L.J. 867, 968 (1972), and Lydick, *State Control of Liquor Advertising Under the United States Constitution*, 12 Baylor L. Rev. 43, 45 (1960). See also several cases in this Court sustaining regulation of advertising, where the First Amendment issue was not raised. E.g., *Erlenbaugh v. United States*, U.S. , 93 S. Ct. 477 (1972) (sustaining conviction for causing a "scratch sheet" newspaper to be transported in interstate commerce); *Head v. New Mexico Board*, 374 U.S. 424 (1963) (upholding as a valid health measure a prohibition of price advertising by optometrists); and *Packer Corporation v. Utah*, 285 U.S. 105 (1932) (upholding state prohibition of tobacco advertising on billboards or placards).

4. Advertising an illegal act, such as discrimination, is subject to regulation.

The prohibition of advertising that aids in discrimination is a much stronger case for state regulation than many of the cases cited above. Unlike, for instance, the California regulation in *California v. LaRue*, supra, or the prohibition of cigarette advertising in *Capital Broadcasting Co. v. Kleindienst*, supra, the Pittsburgh Ordinance is not directed merely at "speech", but is an "incidental burdening of the press" resulting from an enactment "of general applicability" prohibiting discrimination. *Branzburg v. Hayes*, supra, at 682.

Moreover, discrimination in employment is illegal under the City Ordinance, as well as under Pennsylvania Law, see Act of October 27, 1955, P. L. 744, 43 P.S. §§951 et seq., and Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. §2000e et seq. By contrast, the sale of cigarettes or liquor is not itself illegal. Surely, the governmental interest is greater in prohibiting the advertising of an illegal act than it is in prohibiting the advertising of something which the government has not deemed harmful enough to the public interest to outlaw.

> "The easiest case is prohibition of advertising for a product whose sale is unlawful. Once the legislature has determined that sale of the product is sufficiently inimical to the public good to warrant criminal sanctions, it would seem that solicitation of the public to purchase the contraband need not be tolerated."

Developments in the Law—Deceptive Advertising, supra, at 1037.

The Pittsburgh Human Relations Ordinance as applied to discriminatory advertising is like the counselling to murder in *Frohwerk v. United States*, supra. The product being sold—discriminatory employment—is illegal, and so too is the advertising of that product.

The City of Pittsburgh Human Relations Ordinance is by no means rare in its prohibition of discriminatory advertising. Not only is it prohibited on the Federal level, but as early as 1956 a dozen states including Pennsylvania prohibited discriminatory advertising. Note, *The Regulation of Advertising*, 56 Colum. L. Rev. 1108 (1956). Today at least 36 states have such a prohibition. Lab. Rel. Rep. (FEP) 451.

The New York Civil Rights Law, Section 40, has specifically been held to apply to discriminatory advertising by newspapers. *Camp-of-the-Pines v. New York Times Co.*, 184 Misc. 389, 53 N.Y.S. 2d 475 (Sup. Ct. 1945). When the Times printed the plaintiff's ads without the language "selected clientele", the camp sued for breach of contract. The Court found that this phrase was a euphemism for "no Blacks or Jews", just as the Commission here found that the headings "Jobs-Male Interest" and "Jobs-Female Interest", constitute a discriminatory device. As one of its bases for granting the Times' motion for summary judgment, the Court held that the newspaper would be breaking the law if it printed a discriminatory ad.

C. Petitioner's in Terrorem Arguments

1. Official government view.

In several places in its Brief, Petitioner claims that the Commission and the courts below have required it to hew to the "official government opinion" with regard to sex discrimination. Nothing could be further from the truth, as made clear below.

The Court of Common Pleas stated (Pet. App. 43):

> "The Order of the Commission in no way interferes with the editorial or news content of the newspaper. The Press may continue to express its editorial views with freedom. It may editorialize on this elimination of sex-segregated column headings or any other position related to the status of women supported by the publisher and editor. It may report the news on the subject as it sees fit."

Similarly, the Commonwealth Court supported this view (Pet. App. 66; A. 397).

New York State Broadcasters Assn. v. United States, supra, dealt at length with the shibboleth which petiitoner has raised here of "official government view." The Court aptly answered that argument:

> ". . . [I]nvoking the specter of an official government view does not dispose of the real issues before us. There is an 'official' govern-

ment view as to the sale of narcotics, see 21 U.S.C. §§173, 174, the offering of fraudulent securities, see 15 U.S.C. §78j(b), the interstate transportation of wagering paraphernalia, see 18 U.S.C. §1953, and the coercion of employees by employers, see 29 U.S.C. §158(a)(1), to name only a few. And the view extends to communications which are designed to—and do—directly effectuate these unwanted results. Clearly an advertisement listing the names and addresses of sellers of narcotics or of fraudulent stock could constitutionally be banned. Of course, we do not suggest that lotteries are a swindle or that lotteries and uncontrolled sale of narcotics are equally deserving of condemnation, but Congress has the power to have a 'view' as to these types of conduct and to take steps to inhibit each. Nor do we see a viable distinction here because there is legislative unanimity as to swindling or narcotics but a difference of opinion as to lotteries.

The real point here is that we are not primarily in the realm of ideas at all but are chiefly concerned with speech closely allied with the putting into effect of prohibited conduct."

414 F. 2d at 996-97.

Likewise, we are dealing here with speech that aids the putting into effect of prohibited conduct.

2. Prior restraint.

Petitioner also raises the cry of "prior restraint" based upon the landmark case of *Near v. Minnesota*, 283 U.S. 697 (1931). Like the "official government view" argument, it is a vital doctrine, but reliance upon it is misplaced here, as it was in *Hunter*, supra, and in the cases cited therein:

> "Congressional regulation of commercial advertising is not barred by Near v. Minnesota, 283 U.S. 697, 51 S. Ct. 625, 75 L. Ed. 1357 (1931), which condemned unlawful prior restraints on free speech. The Supreme Court and lower courts have frequently rejected First Amendment attacks on injunctions when the enjoined conduct or expression was not fully protected by the First Amendment. Lorain Journal Co. v. United States, supra (Unanimous opinion upholding injunction prohibiting publisher from accepting or rejecting commercial advertisements of others in violation of the antitrust laws); Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 439, 31 S. Ct. 492, 55 L. Ed. 797 (1911) (upholding injunction against union newspaper promoting boycott). See also Head v. New Mexico Board of Examiners, 374 U.S. 424, 432 n. 12, 83 S. Ct. 1759, 10 L. Ed. 2d 983 (1963). (injunction restraining newspaper from publishing optometrist's advertising affirmed against attack based on the due process clause.)"
>
> 459 F. 2d at 212, 213.

3. Burden on press as a screening agency.

Petitioner argues and Amicus American Newspaper Publishers Association complains at length that newspapers are being drafted as the "first line enforcement agencies" in the battle against sex discrimination by being forced to "screen" advertisements. This argument comes with ill grace from petitioner which takes pains to screen ads to make certain they go into the particular sex-designated column that employers want (A. 129, 157, 171).

The alleged burden is asserted to be unlawful on the authority of *Smith v. California*, 361 U.S. 147 (1959). Although petitioner does not elaborate on this position, in *Smith v. California* a conviction of a bookseller for sale of obscene literature was reversed because of the impossible burden that would be placed upon a bookseller if he were held accountable for the content of thousands of books. Similarly, in *Farmer's Educational & Cooperative Union v. WDAY, Inc.*, 360 U.S. 525, 530 (1959), this Court held that §315 of the Federal Communications Act providing for equal time for political candidates, forbids a station to delete libelous material and immunizes it from libel actions. The reasoning was that, because of time limitations, a station could not properly determine if material were libelous, and, if responsible for it, would err on the side of safety and speech would be chilled.

In the first place, this "screening" argument is inapplicable because all of the "speech" that would be chilled here is commercial speech, none of which has

the First Amendment protection accorded the books in *Smith v. California.*

Moreover, the instant case is not analogous to *Smith* and *WDAY* (or to the false advertising cases to which Amicus American Newspaper Publishers Association refers) because petitioner is not put in any sort of difficult position, where it is forced to guess whether a particular advertisement placed in a Male column or a Female column violates the ordinance. As stated in *Hunter:*

> ". . . a newspaper publisher can easily distinguish between permissible and impermissible advertisements in discharging his duty . . ."
> 459 F. 2d at 213.

In fact, the newspaper's "screening" argument is much weaker here than it was in *Hunter.* Clearly Amicus, represented by the same counsel that represents the newspaper in *Hunter,* is so taken with the screening argument in *Hunter* that it seems to be arguing that case rather than this one. It is at least arguable, as Amicus maintains, that words such as "selected clientele", which appeared in the advertisement involved in *Camp-of-the-Pines v. New York Times Co.,* supra, are not such certain earmarks of discrimination that a newspaper should be required to reject such ads or suffer the consequences.

However, petitioner faces no such dilemma. It need not guess as to whether the advertised job is entitled to a bona fide occupational exemption. It merely must refuse to place any advertisement in a

sex-segregated column unless the advertiser has a bona fide occupational exemption certificate as provided for in §7(d) of the Ordinance.

The California Attorney General has held that the mere maintenance of sex-segregated want-ad columns does not violate the California Fair Employment Practices Act, Cal. Labor Code Ann. §§1420(d), (f), since jobs for which a BFOQ exists can legally be advertised in sex-segregated columns. However, where the newspaper has knowledge that a BFOQ exists, the California Attorney General, citing the holding in this case, ruled that publication of a sex-segregated ad aids in discrimination. Opinion No. 71-46 (January 21, 1972).

Here the newspaper does have knowledge; as stated above, there is no guessing required as to whether a BFOQ exemption for a particular job exists. If the advertiser has failed to obtain an exemption certificate pursuant to §7(d), the job is not exempt. If the advertiser does not have such a certificate (no request for an exemption certificate has ever been made to the Commission on sex grounds (Pet. App. 15)), then the newspaper knows that the sex-segregated ad constitutes discrimination. *Cf. National Organization for Women v. Gannett Co. Incorporated*, No. 713/1972 (S. Ct. of N.Y., App. Div., 4th Dept., decided November 30, 1972), wheer the Court refused to find that the newspaper's sex-segregated system by itself constituted aiding and abetting an employer in a discriminatory practice because the New York statute did not have a procedure like §7(d) to tell the paper whether an employer was violating the law.

Since the newspaper has actual knowledge that an ad for a job without an exemption certificate is discriminatory, we need not even rely on Chief Justice Burger's holding in *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971), dealing with the Federal Civil Rights Act of 1964, that lack of discriminatory intent is irrelevant.

In summary, it is clear that this Court and many other courts have repeatedly refused to apply the First Amendment to a commercial advertising situation where no burden is placed upon the media and a substantial public interest is protected.

II. THE ORDER THAT PETITIONER DESIST FROM AIDING EMPLOYERS TO DISCRIMINATE WAS NOT VIOLATIVE OF DUE PROCESS OF LAW

A. Since the Mere Placing of an Advertisement in a Sex-Designated Column Itself Violates §8(e) of the Ordinance, Petitioner Has Aided and Participated With Advertisers in Unlawful Employment Practices

Petitioner contends that it has been denied due process of law because there was no proof that an advertiser discriminated in violation of the ordinance. Although the argument heading merely refers to an alleged lack of proof that an advertiser "discriminated in violation of the ordinance," whereas the argument heading in the Petition for Certiorari read "discriminated *in hiring* in violation of the ordinance," (emphasis added) respondents must assume that petitioner is still referring to discrimination in hiring.*

For it is perfectly apparent that advertisers have committed unlawful discriminatory employment practices in violation of the City of Pittsburgh Ordinance. This case thus cannot be analogized to the "no evidence" cases, *Shuttlesworth v. Birmingham*, 382 U.S.

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*Strangely enough, as the Commonwealth Court pointed out (Pet. App. 58; A. 389), petitioner objected on the grounds of relevancy when complainant introduced evidence of discrimination in hiring (A. 265-66).

87, 94-95 (1965), and *Thompson v. Louisville*, 362 U.S. 199, 206 (1960). Petitioner is simply incorrect in its assertion at page 24 of its brief that the Commonwealth Court held, *inter alia*, that (1) the prohibited aiding is committed by the mere use of sex-segregated column headings, and (2) no instance of a particular act of discriminatory practice by an advertiser need be shown.[7]

While the first contention might properly have been leveled at the Commission's order which required the total dismantling of the sex-segregated system, the Commonwealth Court's Order (Pet. App. 69; A. 400) modified the Commission's Order so as to permit sex-segregated advertising headings where the jobs advertised are exempt under the ordinance (Pet. App. 66-67; A. 397-98) or as may be certified as exempt by the Commission, i.e., BFOQ's (Pet. App. 67; A. 398).[7]

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[7] It should be noted that although the Commonwealth Court held that the City of Pittsburgh Commission on Human Relations has no jurisdiction over advertisements placed by advertisers located outside of the City, the Pennsylvania Commission on Human Relations, operating under similar legislation (43 P.S. §§951 et seq.) would govern as to those advertisers and those who aid them, like petitioner. In return for respondents' consent to the grant by the Pennsylvania Supreme Court of a supersedeas pending the proceedings in this Court, petitioner agreed that if the decision here is adverse to it, it will eliminate sex-segregated ads for those advertisers outside the City of Pittsburgh who would be governed by the Pennsylvania Act, thus obviating the need for duplicating proceedings by the Pennsylvania Commission.

The second contention is also incorrect. Petitioner ignores §8(e) of the Ordinance, whereby the placing of an advertisement indicating discrimination is itself an unlawful employment practice.

Discrimination is defined in §4(B) of the Ordinance, as amended by Ordinance No. 395, approved July 7, 1969, as follows:

> "(B) Discriminate or discrimination—
>
> The terms "discriminate" and "discrimination" include any difference in treatment based on . . . sex." (Pet. App. 107; A. 435)

That the Commission and the courts properly interpreted the Ordinance to hold that placing an ad in a sex-segregated column is indicating a difference in treatment based on sex, is indisputable here. First, this Court has held that it must accept the state court's interpretation of state legislation, including the Pittsburgh Ordinance involved here. *Garner v. Louisiana*, 368 U.S. 157, 169 (1961); *Kovacs v. Cooper*, 336 U.S. 77, 84-85 (1949). Second, the Commission and the state courts were clearly correct. Counsel for petitioner admitted this (A. 176):

> ". . . there obviously is a difference in treatment . . ."

In *Brown v. Board of Education*, 347 U.S. 483, 495 (1954), this Court held that separate educational facilities were inherently unequal.

The disclaimer is of no help to petitioner. As stated by the Commonwealth Court:

"We have long passed that point in the advancement of civil rights whereby a declaration of intent can be used as a screen or defense for actual discrimination. The 'separate but equal' principle is no longer a legitimate argument in civil rights cases."
(Pet. App. 59; A. 390).

This view was echoed by the Court of Appeals for the Fifth Circuit dealing with sex discrimination against males in *Hailes v. United Air Lines*, 464 F. 2d 1006, 1009 (5th Cir. 1972):

> "... the placing of the ad in the 'Help Wanted —Female' column without a corresponding ad in the 'Help Wanted—Male' column so plainly indicates a preference for females it cannot be neutralized by the self-conferred title of 'Equal Opportunity Employer.'"

This Court has refused to exalt form over substance in other civil rights cases. *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 236 (1969); *Daniel v. Paul*, 395 U.S. 298, 301-02 (1969).

Moreover, as the Commission pointed out, the United States Equal Employment Opportunity Commission, the United States Department of Labor, the Civil Rights Commission of Colorado, and the Nebraska Equal Opportunity Commission have all ruled that the placement of an advertisement in columns headed "Male" or "Female" will be considered an expression of discrimination based on sex (Pet. App. 11-12).

Placing an ad for a job that does not carry a bona fide occupational exemption in a column with a sex-designated heading itself is discriminatory. Just as this Court refused to allow Louisiana to place racial labels on candidates for political office in *Anderson v. Martin*, 375 U.S. 399 (1964), because of their use as a discriminatory vehicle, so too the Pittsburgh Ordinance prevents sex labels for the same reason.

Even if separate were not inherently unequal under the Ordinance, the testimony from petitioner's own Classified Ad Manager, Robert Seli, when called as for cross-examination by Complainant, amply proves that employers who advertise in the "Jobs-Male Interest" or "Jobs-Female Interest" columns are expressing a preference based on sex (A. 125-26).

> "Q. As far as employment opportunity ads are concerned, do your takers have the discretion to place jobs in any particular column if the advertiser does not express any preference?
>
> A. No sir, most of the people, who call in have a preference. Let's put it this way. They know where they want the ad to run—automobile or real estate or male interest or female interest. They express this interest where they would like to have this ad placed. In what category. At times, when they do not express a preference, we ask them where they would prefer to have it placed.
>
> Q. If the advertiser clearly expresses a preference for male or female, the Press abides by the preference expressed by the advertiser?

A. Yes, but there is a little difference here. If somebody asks to place a help wanted ad under automobile advertising, we will not accept it. It has to run under help wanted. It's a job offering. It's run under opportunities.

Q. When no preference is expressed by advertisers, you then solicit from the advertiser a response to whether he has a preference?

A. Yes, where they would prefer to have it placed.

Q. In case there is no preference expressed, even after solicitation, who then at the Pittsburgh Press decides which column it goes in?

A. I don't think we have this problem, really.

Q. In each case there is an expression of preference by the advertiser?

A. Yes."

Again, the same sort of testimony appears in Mr. Seli's direct testimony in petitioner's case (A. 173):

"Q. Is this the only type of—if I may use the word—education for your advertisers? Do you then proceed to tell them of the several categories that should go under this or that, take your choice?

A. We tell them where the majority is—or we try to find out what type of a person they are looking for. Are they looking for a man, or are they looking for a woman? They know this. And *they are interested or more interested in a man or more interested in a woman.* They

know this, and they state this. This is where they want it." (Emphasis added.)

The discrimination inherent in placing an ad in a sex-segregated column is particularly apparent when it is recognized, as the Commission pointed out (Pet. App. 10), that petitioner has not simply a Male Column and a Female Column, but a "Male-Female" column. An employer not wishing to discriminate need only advertise in the "Male-Female" column.

Moreover, while petitioner euphemistically labels the columns "Jobs-Male Interest" and "Jobs-Female Interest", these are the same columns that prior to October, 1969, were labeled "Male Help Wanted" and "Female Help Wanted" (Pet. App. 10). Calling the "Male Help Wanted" column "Jobs-Male Interest" and adding a self-serving disclaimer no more changes the intrinsic nature of the column than calling a dog a cat makes it one.

Pages 305 to 353 of the Appendix are replete with advertisements, none of which carries a BFOQ exemption certificate, placed by advertisers in sex-segregated columns and thus violative of §8(e) of the Ordinance. Petitioner, in aiding and participating with such advertisers, is itself violating §8(j).

Thus, an argument that there is no proof that an advertiser discriminated at all is impaled upon the clear language of §8(e). This is an issue which petitioner has refused to face in the argument made in this Court. Instead, its argument is addressed to an alleged failure of proof that an advertiser discriminated in *hiring*.

B. The "Presumption" Cases Are Inapplicable

The reason for requiring a showing that an employer discriminated in hiring, says petitioner (P. 25), is that the use of sex-segregated column headings does not have a real and substantial relationship to the denial of equal employment opportunity to women on account of sex. However, the "presumption" cases cited by petitioner in no way support the position it has taken. Those cases hold that a legislative determination that proof of one fact which is entirely lawful in itself, e.g., possession of a firearm as in *Tot v. United States*, 319 U.S. 463 (1943), cannot be evidence of the ultimate fact on which guilt of a crime is predicated unless there is a rational connection between the fact proved and the ultimate fact presumed. In the instant case, we have seen that placing a discriminatory advertisement is itself unlawful, under §8(e), totally apart from whether discrimination in hiring violative of §8(a) took place. The Commonwealth Court correctly recognized this distinction when it held:

> "If the advertising column headings here are discriminatory, they are in violation of the Ordinance per se, and there need not be a specific 'particular' on an actual discrimination suffered by any particular woman. If discriminatory, the column headings were in violation before the first woman actually suffered any act of discrimination." (Footnote omitted.)
>
> (Pet. App. 57; A. 388).

Thus, the facts proved (the discriminatory advertisement and petitioner's aiding it and participating in it) are themselves violations of law and "ultimate facts" in the language of the presumption cases.

C. Since Advertising in Sex-Segregated Columns Is an Evil Within the Power of a Legislative Body To Eradicate, Petitioner Has Not Been Denied Substantive Due Process

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Although petitioner contends (P. 26) that the Commonwealth Court equates sex-segregated advertisements with discrimination in hiring practices, it is not simply the Court which has done this; it is the ordinance in §8(e) thereof. If there is an absence of rational connection, which most assuredly there is not, it is in the Ordinance, not in the proceedings below. In fact, this is what petitioner states in its Summary of Argument (P. 10):

> "Due process requires that there be a reasonable relationship between the evil recognized and the manner in which a governmental body attempts to eliminate that evil."

It is difficult to believe, but in 1973, petitioner is asserting a *substantive* due process argument.

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1. Petitioner cannot raise an issue for the first time in this Court.

A substantive due process claim is not open to petitioner at this stage of the proceedings. Petitioner cannot, merely by the use of an all-inclusive heading like "Due Process", now change its argument.

Argument

(a) *Procedural, Not Substantive, Due Process Was Raised in the Petition for Certiorari*

Supreme Court Rule 23(c)(1) provides:

> "Only the questions set forth in the petition or fairly comprised therein will be considered by the Court."

This Rule summarizes the practice in this Court throughout the years. See *Trailmobile Co. v. Whirls*, 331 U.S. 40 (1947); *Dickinson Industrial Site v. Cowan*, 309 U.S. 382 (1940); *Crown Cork & Seal Co. v. Ferdinand Gutmann Co.*, 304 U.S. 159 (1938).

Petitioner's due process argument in the petition for certiorari was a *procedural* due process argument. The quotation at page 16 of the petition from *Cole v. Arkansas*, 333 U.S. 196 (1948), specifically uses the words *"procedural due process"* (emphasis added).

(b) *Procedural, Not Substantive, Due Process Was Raised in the Courts Below*

Likewise, the due process argument before the Commonwealth Court was *procedural* due process. *Cole v. Arkansas* was quoted there also. Petitioner's brief dealt largely with the requirement that procedural due process apply before administrative bodies as well as courts.

This Court has often held that it will not consider issues not raised below. *Adickes v. S. H. Kress and Company*, 398 U.S. 144, 147 (1970), and cases cited therein. *Adickes* was a case arising from a

United States Court of Appeals. The instant case, arising from a state system, is the *a fortiori* case, when the natural respect which the federal system should accord the courts of a state is taken into consideration.

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2. This Court is not a super-legislature.

Petitioner contends that there is no rational relationship between the prohibition of advertising in sex-segregated columns and denial of employment opportunity to women on account of sex.

This argument, however, is presented to the wrong body. It should have been presented to the Council of the City of Pittsburgh when it adopted the Human Relations Ordinance. As this Court said in *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965):

> "We do not act as a super-legislature to determine the wisdom, need and propriety of laws that touch economic problems, business affairs or social conditions."

Petitioner would take us back to those unfortunate days when the Due Process Clause was used as the basis for this Court to strike down social legislation with which it did not happen to agree. *Adkins v. Children's Hospital*, 261 U.S. 525 (1923) (holding unconstitutional a minimum wage statute); *Lochner v. New York*, 198 U.S. 45 (1905) (holding unconstitutional a maximum hour law).

In *Ferguson v. Skrupa*, 372 U.S. 726 (1963) and *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955),

this Court summarized its present position. In *Williamson*, Justice Douglas, for the Court, held:

> "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought. See Nebbia v. New York, 291 U.S. 502; West Coast Hotel Co. v. Parrish, 300 U.S. 379; Olsen v. State of Nebraska, 313 U.S. 236; Lincoln Union v. Northwestern Co., 335 U.S. 525; Daniel v. Family Ins. Co., 336 U.S. 220; Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421. We emphasize again what Chief Justice Waite said in Munn v. Illinois, 94 U.S. 113, 134. 'For protection against abuses by legislatures the people must resort to the polls, not to the courts.'"
>
> 348 U.S. at 488.

In *Lincoln Union v. Northwestern Co.*, 335 U.S. 525 (1949), this Court upheld the constitutionality of a North Carolina statute and a Nebraska constitutional amendment prohibiting employment discrimination against non-union members and forbidding employers from entering into contracts obligating themselves to exclude persons from employment because they were or were not union members. The union contended that the prohibition against contracts requiring the employer to refuse to hire or retain non-union workers was a violation of due process. This Court replied that the provision merely provided a

method to aid enforcement of the heart of the laws, the requirement that employers not discriminate. Similarly here the prohibition against discriminatory advertising provides a method to aid in enforcement of the heart of the law, the anti-discrimination requirement.

This Court went on in *Lincoln* to consider whether the due process clause prohibits a state from passing laws to safeguard the rights of non-union workers to get and to hold jobs, free from discrimination. Rejecting the *Adkins* and *Lochner* line of cases, this Court held that states may legislate against injurious economic and social practices unless such legislation runs afoul of some specific federal constitutional or statutory provision. Just as states have power to prohibit discrimination against non-union members, they have power to prohibit discrimination against women. As stated in *Williamson v. Lee Optical Co.*, supra, at 487-88:

> "... it is for the legislature, not the courts, to balance the advantages and disadvantages of the [legislation] ... It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."[8]

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[8] *Roe v. Wade*, 41 LW 4213 (1973) and *Doe v. Bolton*, 41 LW 4233 (1973) are not to the contrary. These cases struck down state abortion statutes held by this Court to violate a right of privacy encompassed within the liberty of the Fourteenth Amendment. Justice Blackmun for the Court began by paying heed to Justice Holmes' dissent in *Lochner v. New York*, supra, 41 LW at 4214. Justice Douglas, con-

3. Prohibition of sex-segregated want-ads is a rational means of preventing discrimination in employment.

We have seen that both Title VII of the Civil Rights Act of 1964, dealing with the elimination of employment discrimination, and the Civil Rights Act of 1968, dealing with the elimination of housing discrimination, have viewed the prohibition of discriminatory advertising as a rational means of achieving these ends. Likewise, some thirty-six states have prohibited discriminatory advertising. Lab. Rel. Rep. (FEP) 451.

Furthermore, in Part I of this Brief, we have cited numerous cases, dealing with cigarettes, alcohol and other disfavored products, which have sustained pro-

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curring, pointed out forcefully, 41 LW at 4243 n.4, that neither the abortion cases nor *Griswold v. Connecticut*, supra (in which he was the author of the Court's opinion), dealing with the particular right of privacy, reintroduced the substantive due process concept whereby state regulation of business and commercial enterprises would be held unconstitutional because the Court disagreed with the economic or social theory upon which the legislation was based. *But see* Justice Stewart's concurring opinion in *Roe*, 41 LW at 4230-31, adhering to his dissenting opinion in *Griswold*.

Even if a compelling state interest were required here, as in *Roe* and *Doe*, the elimination of sex discrimination surely supplies that interest.

Moreover, *Roe* and *Doe* can be read as a recognition by this Court, as it recognized in *Reed v. Reed*, 404 U.S. 71 (1971), and as the City of Pittsburgh recognized in its ordinance, that women can no longer be accorded second-class citizenship status. (Footnote added.)

hibitions against advertising to achieve a valid societal goal.

More specifically as to sex-segregated want-ads, we have seen that the placing of such an ad "plainly indicates a preference," *Hailes v. United Air Lines*, supra, at 1009, and that numerous agencies and commissions, including the United States Equal Employment Opportunity Commission [EEOC] and the United States Department of Labor, have ruled sex-segregated want ads to be discriminatory and unlawful. See Boyer, *Help-Wanted Advertising—Everywoman's Barrier*, 23 Hastings L.J. 221 (1971).

In *American Newspaper Publishing Association v. Alexander*, 294 F. Supp. 1100 (D.D.C. 1968), *motion for summary reversal denied*, 70 LRRM 3118 (C.A.D.C. 1969), the Court held that an EEOC guideline, providing that placing an ad in a sex-segregated column is a violation of §704(b) of Title VII, represented a reasonable interpretation of that Section.

In light of the many rulings that discriminatory want-ad advertising leads to discrimination in employment, the prohibition of sex-segregated want-ads, we submit, could have been thought by the Council of the City of Pittsburgh to be a rational means of preventing discrimination in employment. *Williamson v. Lee Optical Co.*, supra.

Moreover, although such evidence is unnecessary to sustain the legislative judgment, the record in the instant case provides strong support. We have al-

ready seen the testimony of petitioner's advertising manager that advertisers place their ads in the Male column if they are looking for a man and in the Female column if they are looking for a woman (A. 125-26, 173).

An advertiser, Mabel Anderson, the director of Cosmopolitan Placement, an employment agency, testified to the same effect (A. 118):

> "Q. In your experience in placing an ad, placing ads as personnel director in your experience does the placing of an ad under male interest in the newspaper indicate to you a preference by the employer as to sex?
>
> A. To a great extent, yes. . . ."

The transparent shift from a "Help Wanted" to an "Interest" format has also been discussed.

There is also testimony in this record of actual discrimination in hiring suffered by women who had responded to advertisements placed in the "Jobs-Male Interest" column in the Pittsburgh Press (A. 264, 52-53, 122-23).

Finally, the record in this case is replete with studies and sociological data showing the connection between discriminatory advertising and discriminatory hiring. The study performed by Dr. Bem, for example, showed that the placement of an advertisement in the "Male Interest" column, even when the disclaimer is much more prominent than it is here, will effectively discourage many female applicants who otherwise would be interested in the job (A.

236-41). The percentage of females hired for Federal Civil Service professional and administrative jobs increased markedly when the reference to sex was eliminated in advertisements (A. 102). As Congresswoman Griffiths of Michigan, discussing this very question, put it:

> "The inevitable consequence of putting the ad in the 'male' or 'female' column is to cut off at the outset any further reading of the ads under that label by persons of the opposite sex."
>
> 112 Cong. Rec. 13056 (1966).

Dr. Gardner's testimony is to like effect (A. 40).

Finally, the testimony of Catherine East, Executive Secretary of the Interdepartmental Committee on the Status of Women and of the Citizen's Advisory Council on the Status of Women, is relevant (A. 89-93). Both groups were established under Executive Order 1126 of the President of the United States. The former is composed of six Cabinet Officers, the Chairman of the Civil Service Commission, and the Director of the Office of Economic Opportunity. The latter is composed of twenty private citizens appointed by the President. The Council considered the question of sex-segregated want-ads and determined that they served only to advise prospective job applicants not to apply where they were not wanted, thus perpetuating discrimination. Furthermore, the Council found that the sex-segregated columns not only aided employers to discriminate, but encouraged them to put sex label on jobs.

Surely, with the wealth of information showing the mertricious relationship between discriminatory advertising and discrimination in employment, it was not an irrational means to achieve equal employment opportunity for the Council of the City of Pittsburgh to enact legislation prohibiting such discriminatory advertising.

Petitioner's principal contention from the outset in this case has been that sex discrimination is somehow different from other forms of discrimination, and is not an evil. Petitioner's advertising manager testified on redirect examination (A. 180):

> "Q. Do you see any difference between the sex discrimination and the other discriminations that are part of the law?
>
> A. The difference between race and sex?
>
> Q. Yes.
>
> A. Definitely.
>
> Q. You do?
>
> A. There is a difference in sex. I don't see any difference in race and color."

He further testified (A. 181):

> "I think everybody believes or is against discrimination in other fields, but can't see where they are the same. There is a difference in sex where there is not a difference in religion, race or creed or color."

In closing argument before the Commission, counsel for petitioner asserted (A. 287):

"We all know what we see with our eyes, that men and women are much different in regard to employment than are whites and negroes, whites and blacks, christians and jews, mexican-Americans and American Indians; . . .

We feel that the biggest trap that this Commission could fall into is equating sex as just one other discriminatory medium."

Petitioner's contention that sex discrimination may e differentiated from racial or other types of dis-rimination, flies in the face of the Pittsburgh Ordi-ance. Section 4(B) of that Ordinance defines dis-rimination as "any difference in treatment based on ace, color, religion, ancestry, national origin, place f birth, or sex." Section 20 of the Ordinance makes an unlawful employment practice to discriminate ecause of sex. Compare Section 703(a)(1) of the ivil Rights Act of 1964, 42 U.S.C.A. §2000e-2(a)(1), which likewise refers to sex in a series of other nproper group classifications.

As stated in *Rosenfeld v. Southern Pacific Company*, 444 F. 2d 1219, 1225 (9th Cir. 1971):

"The premise of Title VII, the wisdom of which is not in question here, is that women are now to be on an equal footing with men."

Throughout these proceedings, petitioner has not en able to accept the proposition that equal does deed mean equal where men and women are con-rned. It recoils from the consequences of its posi-n and refuses to admit that if its position is cor-

rect, column headings labeled "Jobs-White Interest" or "Jobs-Christian Interest," are permissible (Petitioner's Brief, p. 26). Yet the Ordinance treats sex discrimination exactly the same as it treats racial or religious discrimination.

Perhaps the explanation for petitioner's chameleon-like changes of position on the due process question derives from its unsuccessful search to find a theory that will allow it to continue to implement its position that sex discrimination in employment is somehow different from other forms of discrimination.

D. Petitioner Had Notice of the Charges Against It Sufficient To Comport With the Requirements of Due Process

1. The question is not before this Court.

Petitioner has not argued here and has thus abandoned the claim made below that it was denied due process because the complaint did not allege a violation by a particular employer. Although American Newspaper Publisher Association, Amicus, attempts to resuscitate this issue, it may not do so. As stated in 4 *Am. Jur.* 2d, *Amicus Curiae*, §3:

> "An amicus curiae . . . must accept the case before the court with the issues made by the parties."

See *Moffat Tunnel Improvement Dist. v. Denver & S. L. Ry. Co.*, 45 F. 2d 715 (10th Cir. 1930), cert. denied, 283 U.S. 839 (1931); *State ex rel. Nesbitt v. Ford*, Okla., 434 P. 2d 934 (1967); *Phoenix v. Phoenix Civic Auditorium & Convention Center Asso.*, 99 Ariz. 270, 408 P. 2d 818 (1965); *Gem Stores, Inc. v. O'Brien*, Mo., 374 S.W. 2d 109 (1963); *Long v. Odell*, 60 Wash. 2d 151, 372 P. 2d 548 (1962); *State by Clark v. Applebaum's Food Markets, Inc.*, 259 Minn. 209, 106 N.W. 2d 896 (1960).

Moreover, the issue which the Amicus seeks to raise on its own is one which is appropriate only to the party involved. If petitioner is satisfied at this point that it has not been deprived of any legal right based on the notice given it in the complaint,

Amicus has no right to insist upon a determination of an issue not properly before this Court.

Perhaps petitioner was convinced by the Commonwealth Court decision that such a hypertechnical position was incorrect. The Commission from the outset indicated its willingness to grant petitioner additional time to prepare its case, if it desired, after complainant's case was presented (A. 23, 150). In fact, petitioner's case did not begin until nearly a month after complainant's was completed (A. 152-53). It is patent that any argument based on lack of notice is groundless. The Commonwealth Court quite properly held that the proper test was "fairness", whether petitioner had sufficient knowledge of the charge against it to enable it to defend, and ruled that the complaint was sufficiently specific under this test of fairness (Pet. App. 56; A. 387).

Possibly petitioner was desirous, as are respondents, of resolving the basic issues in the case so that this long process of litigation need not be repeated. In any event, the issues of the sufficiency of the complaint and adequacy of notice thus are not before this Court.

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2. A specific advertiser whom petitioner aided need not be alleged nor proven.

The Amicus argues that a violation by a particular advertiser whom petitioner aided was not alleged, that one cannot aid unless there is a principal, and that such defect has not been cured by the proof because the proof does not show a particular employer aided.

Even if we were dealing with a *criminal* complaint, which we are not, the Amicus' position would be untenable. It is settled law, in the criminal area, that:

> "It is not prerequisite to the conviction of the aider and abettor that the principal be tried and convicted or in fact be identified."
>
> *United States v. Provenzano*, 334 F. 2d 678, 691 (3d Cir.), cert. denied, 379 U.S. 947 (1964).

See *Gray v. United States*, 260 F. 2d 483, 484 (D.C. Cir. 1958) (panel including Judge, now Chief Justice, Burger); *Meredith v. United States*, 238 F. 2d 535, 542 (4th Cir. 1956); *Colosacco v. United States*, 196 F. 2d 165, 167 (10th Cir. 1952); *Von Patzoll v. United States*, 163 F. 2d 216, 219 (10th Cir. 1947).

Here, the Commission found as a fact, based on the testimony of petitioner's advertising manager, that petitioner ran 248,000 help-wanted advertisements in 1969 (Pet. App. 15). It further found that 25% of the ads were placed by advertisers based in the City of Pittsburgh (Pet. App. 15). Approximately 95% of the employment advertisements are placed in the "Jobs-Male Interest" or "Jobs-Female Interest" columns as opposed to the "Male-Female Help" column (A. 35). Thus, tens of thousands of ads violate the City Ordinance and many of the rest violate the Pennsylvania statute.

It is thus clear that advertisers placed ads in sex-segregated columns thousands of times (see pages 305

to 353 of the Appendix for many examples). Petitioner aided and participated with them on each occasion. Even measured by criminal standards, petitioner has not been deprived of any right.

This is not a criminal action, but a civil proceeding seeking to prevent petitioner from continuing its practice. The Commission itself has no power to impose any fines or criminal penalties. See §14 of the Ordinance (A. 431). A criminal prosecution may be instituted before the minor judiciary by the City Solicitor. The question is not whether any *particular* advertiser was aided but rather whether petitioner is to be allowed to continue to aid advertisers who place discriminatory ads. If no advertiser places a discriminatory ad, then petitioner is not affected in the least by the order below.

The Commission's order in this civil proceeding sought to reach the root source of the discrminatory advertising. The ordinance has no requirement that enforcement proceed against the employer as well as the newspaper. In both *United States v. Hunter*, supra, and *Holmgren v. Little Village Community Reporter*, supra, the proceedings were against the newspapers only, not against those who placed the ads. It is an elmentary principle of law that the failure to prosecute all violators does not render an action against one who has violated the law discriminatory or improper. *United States v. Hunter*, supra, at 220.

The evil of sex discrimination has been recognized by the Equal Rights Amendment to the Pennsylvania Constitution, Art. I, §27, adopted May 18, 1971,

P.S. (Const.) Art. I, §27, by the Congress of the United States in proposing for ratification an Equal Rights Amendment to the United States Constitution, and by this Court in *Reed v. Reed*, 404 U.S. 71 (1971).

Respondents have determined that one of the best methods to achieve the eradication of this evil is to proceed against those who enable discrimination to flourish, by publishing discriminatory advertisements. Such a method is nowhere prohibited by the ordinance, nor is it prohibited by the Constitution of the United States.

CONCLUSION

Wherefore, for the foregoing reasons, Respondents respectfully request that the Order of the Commonwealth Court be affirmed.

Respectfully submitted,

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